

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

OAH Case No. 2011081019

v.

HERMOSA BEACH CITY ELEMENTARY
SCHOOL DISTRICT.

DECISION ON REMAND

On August 25, 2011, Parents on behalf of Student filed a Request for Due Process Hearing (complaint) in this matter, naming Hermosa Beach City Elementary School District (District). The hearing took place before Administrative Law Judge Judith L. Pasewark, of the Office of Administrative Hearings on February 27, 28, 29, 2012, and March 1, 12, 13, 14, and 15, 2012. On May 16, 2012, OAH rendered the decision on this matter.

On August 10, 2012, Student filed an appeal of the decision in the United States District Court for the Central District of California, entitled *C.V. et. al. v. Hermosa Beach City School District*, Case No. CV-12-6805-GAF. The matter was heard before federal district court judge Gary Feess through cross motions for summary judgment. On August 12, 2013, Judge Feess issued his order finding that District offered Student a free appropriate public education (FAPE) for the 2010-2011 and 2011-2012 school years. The district court found that the Administrative Law Judge never evaluated the December 11, 2009 Individualized Education Program (IEP) offer of a FAPE, and remanded the case to OAH for determination of this issue.

On November 12, 2013, OAH held a telephonic status conference with the parties to discuss the remand. After reviewing the testimony and administrative record from the original hearing on the matter, the parties determined that the issue of whether the December 11, 2009 IEP offered Student a FAPE had been addressed during the first hearing, making a full supplemental hearing unnecessary. Therefore, the parties stipulated the hearing on the remanded issue should be decided based on the transcript and administrative record from the original hearing of this matter which were submitted to the federal court, and the final decision issued by Judge Feess in that case. The parties submitted timely closing briefs on March 11, 2014, and the matter was submitted.

ISSUE ON REMAND

The issue to be determined in this matter is whether District offered Student a FAPE in the least restrictive environment in its December 11, 2009 IEP.

SUMMARY OF DECISION

There is relatively little factual disagreement between the parties in describing Student and his unique needs. Student contends he is a cognitively gifted child who has been diagnosed with high-functioning Asperger's Syndrome and Attention Deficit Hyperactivity Disorder (ADHD), making Student what is often referred to as a "twice exceptional" child. District concurs with this description of Student, and, at all relevant times, Student has been eligible for special education and services under the categories of autism, based upon his Asperger's, and other health impaired based upon his ADHD. Student contends that District failed to provide Student a placement that satisfied his advanced academic needs as well as addressed his unique disabilities. As a result, Parents placed Student in Bridges Academy (Bridges), a private school, which caters to twice exceptional children. District, on the other hand, contends the December 11, 2009 IEP offered Student a FAPE in the least restrictive environment, by offering him placement in the general education classroom with designated instructional services supports.¹ As will be discussed below, having met all legal requirements for providing Student a FAPE in the least restrictive environment, District is required to do no more.

FACTUAL FINDINGS²

Background

1. Student, at the time of the initial due process hearing, was a 12-year-old boy residing with his parents within District. Student is extremely bright and artistic. He has a rage to learn and a great intellectual curiosity, especially about science and nature.

2. Prior to the 2008-2009 school year, Student attended the Chadwick School (Chadwick), a private school with a general education curriculum, small classes, and a small

¹ In California, related services are also called designated instruction and services (DIS). (Ed. Code, § 56363, subd. (a).)

² Pursuant to the stipulation of the parties, the May 16, 2012 decision on this matter, along with the transcript of the hearing and the district court decision in this matter are included in the record of this proceeding. The entire record of this matter is not relevant to the one remanded issue. Therefore, only those relevant factual findings are used to support the analysis and legal conclusions of this decision on remand.

student population. While at Chadwick, Student developed behavioral issues, exhibited no insight, and complained that he did not like school. At that point, Parents began seeking information and assistance from a series of well-respected psychiatrists, psychologists, and other behavior specialists.

3. Dr. Susan D. McNary, a licensed clinical psychologist, conducted an extensive psychological evaluation of Student over the period of May 30 to July 30, 2007. Dr. McNary's undated written report was thorough and uncompromised. Dr. McNary's testimony presented a good foundation for understanding Student and his unique needs. She described Student as a child who had difficulties at school, in that he could do the work, but would lose attention and become frustrated. Student presented erratic behaviors, misperceptions, difficulties with peer interaction and symptoms of ADHD.

4. Her testing indicated Student exhibited very superior verbal comprehension, and visual perceptual reasoning. His expressive vocabulary was off the charts. His verbal skills, however, were limited by his difficulties with generalizing and applying what he knew in real life. Student scored in the average range in working memory, and processing speed. Student's average scores were considered lower than expected by comparison to his cognitive abilities.

5. Dr. McNary suggested these average scores were potentially indicative of a relative weakness, as Student struggled with symptoms of ADHD in the form of weak frustration and stress tolerance, erratic attention to detail, weak listening, erratic feedback system, erratic focus, difficulty with transitions, weak organization, and significant problems sustaining effort. As a result, Student had a great capacity for learning and possessed a great depth of learning; however, his neurological/ADHD glitches got in the way of his *maximum* success.

6. Dr. McNary also suspected Student might be on the Autism Disorder Spectrum, based upon Student's oppositional behaviors, immaturity, and social/emotional deficits; however, she did not draw that conclusion at the time of her report. Further, although Dr. McNary's written report was provided to District in 2009, the evaluation and recommendations did not address a public school placement. Instead, Dr. McNary anticipated Student would remain at Chadwick, and recommended that Parents continue to provide significant high-end, private supports from numerous psychologists, therapists and learning specialists, which Parents did indeed engage.

7. At Dr. McNary's prompting, Parents obtained a neuropsychological evaluation from Dr. Lisa Waldman, a neuropsychologist who assessed Student in 2008. Dr. Waldman's findings were similar to those of Dr. McNary. While Student presented as a bright boy with many strengths, he also presented with specific neurocognitive weaknesses in many areas, including: adaptive skills (e.g., communication, self-direction, social, school functioning), impulsivity, cognitive flexibility, inhibitory control, working memory, short-term and long-term memory for complex materials and stories, memory for faces, conceptual reasoning, and unstructured tasks. While many of Student's scores in these areas were in the

average range, Dr. Waldman agreed with Dr. McNary, finding the average scores significantly lower than Student's intelligence, academic, and other neurocognitive skills.

8. Dr. Waldman also confirmed Dr. McNary's suspicions regarding Asperger's. Dr. Waldman found that Student's presentations of social skills deficits, restricted interests, cognitive and behavioral rigidity and emotional and behavioral regulation difficulties were consistent with a diagnosis of Asperger's. She stressed Student was on the higher-functioning end of the autism spectrum, and showed higher levels of insight, abstract thinking, and eye contact in some situations than many others with the same diagnosis. Dr. Waldman also confirmed Student's diagnosis of ADHD. Of significant importance, Dr. Waldman indicated her recommendations were not based upon a public school setting. Instead, the recommendations were based upon the *ideal or perfect* program for Student, a program she was not certain even existed. Further, the recommendations were intended to provide Student with guidance in order to realize his potential and apply his talents in the academic setting.

9. Parents, along with the staff at Chadwick, initiated a behavior modification plan, stressing a reward system, and structured Student's day with lots of activities. Student's second grade year was difficult. In third grade, Student received behavior modification, and attended privately funded social skills classes. Parents also provided Student with educational therapy twice a week to teach Student how to *do* school. Parents removed Student from Chadwick at the end of the third grade. At that time, Parents considered enrolling Student in the public school system for the 2008-2009 school year, and requested that District assess Student for special education eligibility, placement, and services.

10. On March 26, 2008, Parents requested District conduct a comprehensive assessment to determine eligibility for special education services. Parents provided District with copies of both Dr. McNary's and Dr. Waldman's prior evaluation reports, along with a follow-up letter to District which provided a synopsis of both evaluations and recommendations. As reported by Student's witnesses, including Dr. McNary, and Dr. Waldman, Student presented as argumentative, demonstrated inconsistent academic performance, a lack of organizational and study skills, compromised executive functioning, immaturity, difficulty with behavioral and social interactions and speech and language needs. Cumulatively, this background information and private assessments provided a thorough description of Student and his unique needs, which has never been disputed by District.

11. District conducted a language and speech assessment of Student. The assessment was comprehensive, and contained observations, standardized assessments, and ratings scales completed by Parents, Student's teacher, and Student's tutor. Student did not challenge this assessment report. The assessor concluded that Student's articulation was in normal limits. His overall language functioning skills were within the average to above average range for his age; however, his scores on tests involving social, abstract, and figurative language were misleading. His ability to apply his knowledge of acceptable social skills in the real world was limited. Further, Student exhibited difficulty with social

interaction and pragmatic language skills across settings, and demonstrated rigid thinking and difficulty interpreting language in school and at home. Student misinterpreted social situations, had difficulty determining the most appropriate response, and was frequently unable to change his language or response according to the needs of a listener or situation. As a result, speech and language services were recommended for Student due to his pragmatic language deficits. Further, he would benefit from social skills support.

12. During the 2008-2009 school year, District also assessed Student in the area of occupational therapy to rule out any suspected disabilities in relation to his sensory systems. Student did not qualify for direct occupational therapy services.

13. District held Student's initial IEP team meeting on June 11, 2008, and found Student eligible for special education and services under a primary eligibility of autism based upon Student's Asperger's, with a secondary eligibility of other health impaired due to Student's ADHD. The IEP team offered placement in a regular classroom with a paraprofessional aide. Eight goals were supported by pull-out specialized academic instruction, individual counseling, group social skills, and group speech and language. A behavior support plan was developed to address Student's work habits and executive skills. The IEP also contained numerous accommodations designed to support Student, such as fidgets, prompting and repeating directions, and testing accommodations. Parents consented to this IEP for the 2008-2009 school year, and Student attended Hermosa Valley Elementary School (Hermosa Valley) during his fourth grade year.

The June 9, 2009 IEP

14. District held an IEP team meeting on June 9, 2009, to prepare Student's IEP for the 2009-2010 school year.³ All statutorily required parties attended the meeting. Parents attended along with their advocate, and were provided a copy of their Parental Rights. The IEP team relied on the prior assessments of Dr. McNary and Dr. Waldman, along with input from Parents, Student's fourth grade teacher, and other service providers to determine Student's unique needs and present levels of performance.

15. Elizabeth Stiles-Beirne, District's speech and language pathologist reported on her observations of Student and his progress on his speech and language goals. Student had made progress in his small group speech and language sessions. Student met his goal on social thinking; however, he only partially met his pragmatic language goal. Basically, he had continued to improve in peer settings, and could, in theory, identify signals and social cues; however, in practice, he still had difficulty generalizing theory to "real time" or "real life" situations. Ms. Stiles-Beirne acknowledged a continuing weakness with pragmatic language, and recommended continuing speech and language goals and services directed

³ Parent's participated in the crafting of this IEP and consented to it. Relevant facts regarding this IEP have been included to describe the IEP in effect at the time of Student's unilateral placement at Bridges and the December 9, 2009 Amendment IEP.

towards unwritten social rules and application of those rules during “real time.” Further, upon observing Student in his classroom, Ms. Stiles-Beirne noted that Student worked in groups in the classroom, took part in classroom discussions, and could be easily redirected when needed. As a result, she reported that Student no longer needed a paraprofessional in the classroom.

16. Christy Cole, a school counselor employed by the Southwest Special Education Local Plan Area, provided Student’s counseling during the fourth grade year. Student’s counseling sessions got off to a rocky start, and were subsequently changed to eliminate individual sessions in favor of group sessions only. Student had been successful in making friends and maintaining relationships. Student had learned to use his own skills and abilities as an asset when interfacing with peers; however, he continued to have difficulty with social awareness, and his behavior was often misinterpreted as disrespectful or rude. Ms. Cole prepared a social/emotional goal to address Student’s social awareness.

17. The IEP offered placement in a general education, fifth grade classroom at Hermosa Valley. District offered specialized academic instruction consultation in the regular classroom for 20 minutes per week; direct specialized academic instruction consisting of individual resource specialist program in the regular classroom to work on study skills for 30 minutes per week; group speech and language instruction for 30 minutes, three times per month; occupational therapy consultation to address Student’s need for fidgets⁴ or other stimuli for 20 minutes per month; and pull-out counseling and guidance for 30 minutes per week. The IEP team also drafted four goals. An organization goal was drafted to work on Student’s self-management and efficiency with organization. A study skills goal was drafted to assist Student in independently maintaining a calendar, prioritizing tasks, developing strategies, and seeking help to turn in completed assignments on time. A social/emotional goal was drafted to assist Student with social awareness. A speech and language goal was drafted to address Student’s difficulties with pragmatics. A considerable number of accommodations were created to support Student with behavior, stress tolerance, organization, homework, and other areas of executive functioning.

18. During the IEP team meeting, Parents reported their frustrations with the 2008-2009 school year. There were difficulties communicating with Student’s teacher. Student expressed frustration with the continual turn-over of District staff during the school year. Mother noted multiple employee changes during the fourth grade had a negative psychological impact on Student and resulted in chaos and poor communication. There were no back-up plans for staff absences or changes in staffing. At home, Student was clearly stressed and found school difficult. He was angry about the resource specialist pull-out services, and angry about his class. By the end of the school year, Student began complaining of stress-related health issues. As a result of his physical ailments, Student left school a week early for medical testing.

⁴ A fidget is a physical stimulus, such as folding paper, or manipulating a coin, which provides sensory comfort to an individual.

19. Parents consented to the IEP once several changes were made to the section of the IEP which reflected “Concerns of parent relevant to educational progress.” Parents requested Student have a friend in class with him, as he had just begun to make friends and respond to positive peer role models. Based upon Mother’s detailed and trustworthy recollection of the IEP team meeting, it is clear that the IEP team understood the crucial nature of the request for a friend in the fifth grade class.

The 2009-2010 School Year and December 11, 2009 IEP Team Meeting

20. Over the summer of 2009, Student attended a private summer camp for special education kids, participated in a lifeguard program with his two friends from school, attended an art class, and learned fencing. By the end of the summer, Student’s social skills had improved and he felt better about himself.

21. Only a few days before school resumed, Parents learned, in spite of their strenuous emphasis on the need to place Student in a class with at least one of his friends, District had failed to do so. Student was devastated, and perseverated on the subject for weeks at home. This preventable and decidedly imprudent oversight on District’s part clearly tainted the new school year.

22. District placed Student in Rianne Albert’s fifth grade class. Ms. Albert had taught the fifth grade for three years. She is a credentialed general education teacher in both California and New Jersey, and holds a master’s degree in special education. In addition to her fifth grade class, Ms. Albert also taught an after-school study skills class which focused on organization strategies and study tips. Although Student only attended Ms. Albert’s class for a few months, the lines of communication between parent and teacher improved, and Mother also participated in Student’s class as a parent volunteer for their literature groups. Mother gave Ms. Albert an “A” for effort, and described Ms. Albert as a warm and kind teacher with good intentions. With 28 kids in the class, Student took up a lot of Ms. Albert’s time, and Ms. Albert tried to organize Student at the end of each day. More importantly, Student liked his teacher. Ms. Albert also presented as an excellent witness.

23. Ms. Albert did not attend Student’s June 9, 2009 IEP team meeting, nor did she have any input into his goals; however, she was aware of his IEP and areas of need. Ms. Albert implemented Student’s accommodations and provided Student with preferential seating, positive role models, and fidgets. She noted Student would interact with his desk mate and sometimes had difficulty respecting others’ space. Student was allowed to take breaks and was allowed to get up and move around, when needed. Ms. Albert utilized positive behavior reinforcement for all students through the use of a classroom mini-economy and rewards system. She had a good communication system with all parents, which included e-mails, a monthly newsletter, and individual behavior charts which went back and forth, from school to home.

24. Ms. Albert was clearly aware of Student’s unique needs. With Student, she targeted organization, neatness, compliance, completion of work, and remaining on task.

She tracked Student daily and discussed Student's behavior with him twice a day in order to determine his daily behavior grade. As time progressed Student would "catch on" and fewer discussions were needed regarding his behaviors. Ms. Albert also developed nonverbal cues with Student to redirect, check, or correct him. Additionally, Kimberly Long, Student's resource teacher, modified Student's pull-out services, as Student did not like being singled out. Instead, 20 minutes per week of resource services were provided in the classroom, and Ms. Long met with Student daily to assist him with organization.

25. Ms. Albert described Student as creative, innovative and authentic. Academically, she found him to be in the top range of the class, but he was not the top student. Even though she knew he was bright, she noted that sometimes his work would not stand out from that of others. In the short time Ms. Albert had Student in class, she believed he was making progress in social areas. Student was able to work with a peer partner on a science project, and he was beginning to understand "give and take" cooperation. Further, Student did not need assistance or accommodations all the time or in all areas.

26. Parents, however, did not convey important information to District regarding Student's home life. As the school year progressed into October 2009, Student's behavior at home imploded. Student repeatedly told his parents he hated school; it was pure torture for him. As Student told Mother regarding his hatred for school, "you can no longer jolly me out of it." At home, Student expressed he was bored. Student was alone, had no friends and was excluded by his peers, and he knew it. It became harder and harder to get him to go to school. Further, Student would have a meltdown and "really lose it," when he came home from school. By the end of October, Mother fully acknowledged Parents were desperate. Student's stress levels were so high, that he was again presenting with physical ailments such as chest and stomach pains; he was chewing his fingers until they bled. Rather than discuss Student's home issues with District, Parents unilaterally removed him from school as of November 6, 2009.

27. On November 9, 2009, Mother e-mailed Ms. Albert regarding the culmination of Student's apparent difficulties at school. Mother's email and Ms. Albert's November 9, 2009 email response are particularly on point. Mother reported Student had been struggling again lately. He was not sleeping well, and had been complaining of frequent headaches and joint pains. Mother, who is a medical doctor, had not found any physical reasons for these problems, but noted Student was again complaining and commenting about difficulties in school, and disliking school in general. In particular, Student complained of his lack of friends and difficulty getting on with other kids. He seemed to be holding it together at school, but had frequent meltdowns and tears when he got home from school, with his brother, and over homework. Mother believed the quality of Student's work had regressed and Student claimed he was not interested because he was bored. Mother inquired if something specific had happened in the last month or if Student's behavior was just a continuance of his ongoing social difficulties. Mother concluded by expressing concern his current placement might not be appropriate for him to meet his intellectual and social needs after working so hard to patch together a program for him.

Mother did not request an IEP team meeting to discuss modifying Student's IEP to allow him to return to Hermosa Valley.

28. Ms. Albert responded to Mother by email on November 9, 2009. Ms. Albert felt Student would tell her if something was bothering him. Nothing specific was reported, and Ms. Albert was uncertain exactly what he was upset with. She noted that before physical education class on November 5, Student mentioned his knee would not bend right, and he was hesitant to join teams and was unsure whether or not he wanted to play football. Later, he decided he only wanted to throw the football around, and did so with another Student. Student did a good job of helping this student learn how to throw the football correctly, and was very encouraging and even joked around with her.

29. With regards to friends and classmates, Student was not being as confrontational as he had been in the past. Student had developed rules about desk space with his desk mate. When working with his project partner, Ms. Albert did not observe any arguing or confrontations. Even though Ms. Albert had seen progress, Student still needed to work on his friendship skills, like dropping an issue once it has been solved, not arguing, and trying to see other people's viewpoints.

30. As for his homework, Student had been taking everything home that he needed to do his work; however, he was not consistently returning items. Student was doing a much better job of writing down his assignments without prompting. On desk checks, Student required only subtle reminders to put items in their correct binders. In addition, the resource teacher also checked Student's reminders and binders.

31. Student had been making progress in Ms. Albert's classroom. She definitely noted a big difference from when they started to the current date. She felt her working relationship with Student was coming together nicely and he was working hard on his goals. Lastly, Ms. Albert believed, when she had met with Mother at their parent conference on October 20, 2009, they were both on the same page in regards to Student's progress and what they both saw down the road. As a result, Ms. Albert was surprised and upset when she learned that Student had been withdrawn from Hermosa Valley as of November 6, 2009.

32. In deciding to remove student from Hermosa Valley, Parents relied heavily upon the opinion of Dr. McNary which was based upon her observations of Student in and out of school, his continued resistance to going to school, and his perception of his social isolation. Dr. McNary did not believe Student's placement at Hermosa Valley was meeting his social or intellectual needs with regard to an appropriate education for his disabilities of ADHD and Asperger's. While Dr. McNary testified that she observed Student at Hermosa Valley in fall 2009, her testimony focused on the inhospitable manner in which she was treated by District, and her inability to observe Student as she wished. Her testimony gleaned nothing more than Student appeared bored during the lesson, and it was clearly overshadowed by her bias created by her ungracious treatment. Little effort was made to follow up or make inquiries about her observations. Further, her findings and opinion of the observation were not shared with District.

33. On December 11, 2009, District held an IEP team meeting to discuss Parents' concerns about Student's placement and his removal from District to Bridges. Parents indicated District's program did not meet his exceptional mind and social component demands. Parents again stressed they had requested that Student be placed in a classroom with at least one of his friends, which District did not do. Parents linked this oversight to Student's current stress and no social connection with the people at school, other than Ms. Albert. In testimony, Mother indicated, that had a friend been placed in class with Student, Parents most likely would not have withdrawn Student from Hermosa Valley. Parents further considered Student's current IEP to be a mismatched situation where Student was not being academically challenged. Mother believed District's teaching strategies were rigid, and she voiced concern that District's program taught to Student's deficits rather than his strengths.

34. Further, the input from Student's teacher and support staff at Hermosa Valley did not support Parents' concerns about the school setting. Student had made progress with his organizational skills. Student had made progress in his counseling sessions. While Student continued to need feedback on how others perceived his actions, he was much more receptive to the feelings and thoughts of other. Student's ability to change his tone of voice to show that he understood his peers had improved. Student had learned to have discussions rather than argue with his teacher her, and he exhibited less intensity in these discussions as the school year progressed. As of November 9, 2009, Student was earning A's and B+'s in all classes.

35. With regard to Student's gifted status, the IEP team discussed both skipping a grade and differentiated reading groups. A higher grade level summer school program had been previously tested. Although Student could keep up academically, he did not have the social/emotional skills to compete at the higher grade level. With regard to differentiated reading, Parents reported Student read at the 12th grade level. Student, who attended this IEP team meeting, indicated he did not enjoy the accelerated reading program at Hermosa Valley. At Bridges, which utilized a differentiated education methodology, Student reported he was able to read a book and discuss it within a few days.⁵ Student further reported he has never enjoyed school anywhere as much as he liked Bridges.⁶ Based upon all information presented at the IEP team meeting, the IEP team did not offer Student a change of placement.

⁵ Student's witnesses defined differentiated education as one that essentially allows the gifted student to be exempted from boring tasks and allows him to demonstrate mastery of knowledge in alternative ways through delivery of educational opportunities that build on his interests and allows him to develop expertise while utilizing various learning strengths. In essence, this allows the student to step outside the limitations imposed in the school district, i.e., writing assignments, or the procedures and guidelines which are adopted by school districts to establish understanding of the California State curriculum.

LEGAL CONCLUSIONS AND APPLICATIONS OF LAW

Statutory Framework

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 (*Mercer Island*) [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.) Further, educational benefit is not limited to academic needs, but includes the social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Education Hearing Office, et al.* (9th Cir. 1996) 93 F.3d 1458, 1497.)

3. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child’s IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) “Special education” is instruction specially designed to meet the

⁶ Student had visited Bridges in October 2009, and begged his parents to let him go there. As of the December 9, 2009 IEP team meeting, Student had attended Bridges for one month.

unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) A “related service” is one that is required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a) (2006); Ed. Code, § 56363, subd. (a).) Related services typically consist of individualized services tailored to address a disabled pupil’s particular needs. (*C. G. v. Five Town Community School* (1st Cir. 2008) 513 F. 3d 279, 285). An educational agency in formulating a special education program for a disabled pupil is not required to furnish every special service necessary to maximize the child’s potential. (*Rowley, supra*, 458 U.S. at p. 199.) Instead, an educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (*Park v. Anaheim Union High School* (9th Cir. 2006) 464 F.3d 1025, 1033.)

4. In general, an IEP is a written statement for each child with a disability that is developed under the IDEA’s procedures with the participation of parents and school personnel that describes the child’s needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

*Issue: Did the December 11, 2009 IEP provide Student a FAPE in the least restrictive environment?*⁷

STUDENT'S UNIQUE NEEDS

6. Student's primary contention is that District failed to provide Student with an IEP which addressed his "unique need of twice-exceptionality." Student contends while District acknowledged Student's disabilities, it never grasped the nature of his unique needs resulting from being twice exceptional. As a result, there were a number of areas related to Student's education for which District did not provide an appropriate program. Student cites the extensive testimony of Dr. McNary, Dr. Waldman, and Dr. Budding, as well as that of Marci Dann and Marti Colglazer from Bridges⁸, which clearly defines and explains Student's unique needs.

7. Student's argument regarding twice exceptional children remains unpersuasive. There is no dispute that Student has gifted cognitive abilities. There is also no dispute that Student qualifies for special education under the categories of autism and other health impairment due to ADHD. In assessment after assessment, Student's areas of unique needs have been accurately identified with no major discrepancies between the findings of District and those of Student's private assessors. Student struggled with symptoms of ADHD in the form of weak frustration and stress tolerance, erratic attention to detail, weak listening, erratic feedback system, erratic focus, difficulty with transitions, weak organization, and significant problems sustaining effort. As indicated in the original decision, the area of disagreement lies in the depth of the obligation District has to a gifted Student in relation to his special education needs.

8. The IDEA is silent regarding "twice exceptional" or "gifted" students. (*Letter to Anonymous*, 55 IDELR 172 (OSEP January 13, 2010).) An intellectually gifted student is not considered disabled under the IDEA, and is not eligible for special education and services solely on that basis. (*Roane County Sch. Sys. v. Ned A.*, 22 IDELR 574 (E.D. Tenn. 1995).) Rather, a gifted student who needs special education because of an independent qualifying disabling condition retains his rights under the IDEA, even if he is classified as

⁷ Student argued several additional issues which were not part of Student's original complaint, and were not part of the district's court order remanding the case. Therefore, Student's contentions that (1) District failed to conduct any standardized assessments; (2) the present level of performance contained in the June 2009 IEP were inaccurate; (3) the June 2009 IEP no longer provided Student with dedicated 1:1 assistance; (4) District failed to implement the June 2009 IEP; and (5) District did not understand the educational program at Bridges, are not addressed in this decision.

⁸ The testimonies of these witnesses is reported in the initial decision, but remains cumulative to the factual findings of Dr. McNary's testimony, and therefore are not reported at length in this decision.

intellectually gifted under state law. (*Board of Ed. of the City of New York*, 28 IDELR 1093 (SEA NY 1998).) As a result, existing case law relates to twice-exceptionality as it applies to a gifted child's *eligibility* for special education.

9. Student contends Education Code, sections 52201 and 52202 establish a mandatory obligation to gifted students. Student's analogy, however, bears no relation to the IDEA or California special education law. The sections cited by Student refer to regulations regarding "Gifted and Talented Pupil Programs" (GATE). Despite Student's arguments, GATE programs remain optional for school districts. California neither requires a school district to identify gifted students nor provide them with advanced educational programs. District has opted *not* to create a gifted program for *any* student. Instead, District provides differentiated classes which are accessible by individual testing in specific subjects. Student has presented no authority to suggest special education law has been expanded to create a separate classification for twice-exceptionality or the law has even identified twice-exceptionality as a unique need.

10. Once a twice-exceptional student is found eligible for special education, the IEP for the student is created in the same manner as other IEP's, and is driven by the needs of the student, the determination of areas in which the student needs special instruction, and determination of accommodations the student needs to access the curriculum in the least restrictive environment. It is not the student's giftedness which drives the IEP, it is the student's unique needs.

PROCEDURAL VIOLATION

11. Student contends District committed a procedural violation of the IDEA by failing to include Student's teachers from Bridges at Student's December 11, 2009 IEP team meeting. Student argues that persons most knowledgeable concerning Student must attend an IEP team meeting.

12. There is a two-part test to determine whether an educational agency has provided a FAPE for a disabled child: "First, has the State complied with the procedures set forth in the Act? And, second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" (*Rowley, supra*, 458 U.S. at pp. 206-207.)

13. Procedural violations that interfere with parental participation in the development of the IEP "undermine the very essence of the IDEA." (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892.) An IEP cannot address the child's unique needs if the people most familiar with the child's needs are not involved or fully informed. (*Ibid.*) A school district cannot independently develop an IEP without input or participation from the parents and other required members of the IEP team. (*Ms. S. v. Board of Trustees of Target Range School District, No. 23*, (9th Cir. 1992) 960 F.2d 1479, 1484.)

14. Student's contention remains misplaced and does not constitute a violation of the IDEA. Student's claim that a staff member from Bridges was a required member of the IEP team was not persuasive. An IEP team is composed of the parents; at least one regular education teacher; at least one special education teacher or, if appropriate, at least one of the student's special education providers; and other persons who have knowledge or special expertise regarding the student, *at the discretion* of the parent or school district; and the child, whenever appropriate. (20 U.S.C. § 1414(d)(1)(B); Ed. Code, § 56341, subd. (b).) Further, it is within the discretion of the school district to determine which of its personnel will fill the roles for the district's required participants at the IEP team meeting. (71 Fed.Reg. 46674 (Aug. 14, 2006).) The regular education teacher who is a member of the IEP team need not be the child's current regular education teacher. (*R.B. v. Napa Valley Unified Sch. Dist.* (9th Cir. 2007) 496 F.3d 932, 939.) As decided in both the original decision and district court appeal,⁹ District was not required to invite a member of the Bridges staff.

DISTRICT'S OFFER OF PLACEMENT IN A GENERAL EDUCATION FIFTH
GRADE CLASSROOM OFFERED IN THE DECEMBER 11, 2009 IEP DID NOT
REPRESENT A DENIAL OF FAPE

15. An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*).) The Ninth Circuit has endorsed the "snapshot rule," explaining that an IEP "is a snapshot, not a retrospective." The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*) In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program child. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.)

16. The only issue Student raised regarding Student's December 11, 2009 IEP was the placement. Student contends District offer of placement in the fifth grade general education classroom denied him a FAPE. This contention is largely based upon Dr. McNary's determination that Student's operative June 9, 2009 IEP placement was not meeting his social and intellectual needs. District, however, was unaware of Parents concerns. Parents had consented to the June 9, 2009 IEP in its entirety, and subsequently raised no issues regarding the goals or services contained therein. Prior to enrolling Student at Bridges on November 9, 2009, Parents did not convey their concerns to the District regarding Student's behavior at home, nor were Dr. McNary's opinions shared with the District.

⁹ Judge Feess also addressed this issue and determined District had no obligation to include a representative of a private school at Student's IEP. Specifically, the statutory list of those persons required to compose an IEP team notably excludes from that list any private school representative. (*L.M. v. Capistrano Unified Sch. Dist.*, 556 F. 3d 900, 909 (9th Cir. 2009); 20 U.S.C. § 1414(d)(1)(B).)

17. The centerpiece of a child's special education program is the IEP. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686].) The IEP must include present levels of academic performance and a statement of measurable goals, including achievement and functional goals. (20 U.S.C. § 1414 (d)(1)(A)(II), (III); 34 C.F.R. § 300.320(a)(2), (3)(2006); Ed. Code, § 56345, subd. (a)(2), (3).) It shall also include a statement of the program modifications or supports for school personnel that will be provided to the student to allow the student to advance appropriately toward attaining the annual goals and be involved and make progress in the general education curriculum and to participate in extracurricular activities and other non-academic activities. (34 C.F.R. § 300.320(a)(4)(i), (ii)(2006); Ed. Code, § 56345, subd. (a)(4)(A), (B).)

18. The November 9, 2009 email to District, expressed Mother's concern that the current placement might not be appropriate for Student to meet his intellectual and social needs after working so hard to patch together a program for him. Parents did not request an IEP team meeting to discuss modifying IEP. They had already removed Student from District, enrolled him at Bridges, and were requesting reimbursement for his private school tuition. Further, at the December 11, 2009 IEP team meeting, Parent's voiced no concern over the IEP, except for placement, again indicating that District's general education placement could not meet Student's needs, while Bridges could do so.

19. A school district has the right to select a program for a special education student, as long as the program is able to meet the student's needs; the IDEA does not empower parents to make unilateral decisions about programs funded by the public. (See *N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D.Cal. 2007) 2007 U.S. Dist. Lexis 9135; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F. Supp.2d 880, 885; *O'Dell v. Special Sch. Dist.* (E.D. Mo. 2007) 47 IDELR 216.) Nor must an IEP conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Colombia* (D.D.C. 2002) 238 F. Supp.2d 127, 139 [The IDEA does not provide for an "education...designed according to the parent's desires," citing *Rowley, supra*, 458 U.S. at p. 207].) (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.)

20. There is no doubt that Parents, Student, and Student's experts agree that Bridges could provide Student a meaningful education in an environment they felt was more suited to his unique needs. There is no doubt that Student strongly preferred Bridges. Preference, however is not a determining factor in selecting placement. A school district has the right to select a program for a special education student, as long as the program is able to meet the student's needs; the IDEA does not empower parents to make unilateral decisions about programs funded by the public. Student was making significant progress in both social and academic areas while attending school at Hermosa Valley. Although much more might be done to maximize Student's accomplishments, Student has provided no legal authority that District had a legal obligation to do so. To the contrary, under *Rowley* a school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the child.

21. An IEP meets the *Rowley* standard and is substantively adequate if the plan is likely to produce progression, not regression, and is likely to produce more than trivial advancement such that the door of public education is opened for the disabled child. (*D.F. v. Ramapo Central School Dist.* (2nd Cir. 2005) 430 F.3d 595, 598.) The IEP must be reasonably calculated to enable the child to receive educational benefit in light of the child's intellectual potential. (*R.E. v. New York City Dept. of Educ.* (S.D.N.Y. 2011) 785 F.Supp.2d 28, 42.) An educational agency need not prepare an IEP that offers a potential maximizing education for a disabled child. (*Rowley, supra*, 458 U.S. at p. 197, fn. 21.) Instead, "(T)he assistance that the IDEA mandates is limited in scope. The Act does not require that States do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge. Rather, it much more modestly calls for the creation of individualized programs reasonably calculated to enable the student to make some progress towards the goals in that program." (*Thompson R2-J School v. Luke P.* (10th Cir. 2008) 540 F.3d 1143, 1155.)

22. Student contends that the December 11, 2009 IEP denied Student a FAPE because District did not change its understanding of Student's needs. Student argues that the June 9, 2009 IEP failed Student as of November 2009, because, "while District indicated that Student had made progress on his organizational skills, he still required considerable need for organizational skills; while Student had made progress on his goals, the school psychologist and speech and language therapist indicated Student continued to have difficulties with pragmatics, social skills, and developing relationships with his peers during the beginning of the 2009-2010 school year." While progress on goals is expected during the first quarter of a school year, the expectation that characteristics of Student's neurological disorders would be extinguished in this short time, if at all, is unrealistic, if not disingenuous. These are the very needs which qualified Student for special education, and which must be addressed over the school year on a continuing basis as goals under the IEP.¹⁰

23. Student next contends that the December 11, 2009 IEP team did nothing at all to change the terms of the June 9, 2009 IEP. Student argues, "assuming *arguendo* that the June 2009 IEP had been appropriate, it should have been clear by the time of the December 2009 IEP that something was horribly wrong." Yet, Parents raised no issue beyond placement.

24. Pursuant to the June 9, 2009 IEP, Student was placed in a fifth grade class with a highly qualified general education teacher with special education experience, who also taught the after-school study skills class which focused on organization and study tips. Student's teacher implemented Student's IEP and accommodations, utilized positive behavior reinforcements, and maintained behavior charts. She tracked Student daily, targeted his areas of need, and discussed his behavior with him. Student was making

¹⁰ Taken to its extreme, if the IEP had met Parent's expectations, Student would not require special education, and his placement would simply revert to District's general education classroom without supports or due process recourse.

progress in social areas and was able to work with a peer partner, was not as confrontational, was beginning to understand cooperation, and did not need assistance or accommodations at all times. Student's academic advancement remained A's and B's. At school, Student's IEP was working well, and Student's placement in a general education classroom remained appropriate for him.

25. Student's behavior at school did not reflect the meltdowns reported at home, or Student's dislike of school. To the contrary, by the end of October, Student was beginning to relax in the classroom, and was honest about how he felt about things. Student had been making "huge" progress in class, and was working hard on his goals. None of the witnesses contradicted Ms. Albert's testimony, nor were the goals shown as inappropriate or ineffectual at school. While Student's witnesses may have had differing opinions of how to most effectively educate Student, none of their information was shared with District for the December 9, 2009 IEP team meeting. Further, while Student's experts advocate a "differentiated education" for Student, as a better methodology with which to teach Student, no evidence was presented to indicate Student was unable to learn in the general education classroom.

26. Student's behavior at school did not reflect the meltdowns reported at home, or Student's dislike of school. To the contrary, by the end of October, Student was beginning to relax in the classroom, and was honest about how he felt about things. Student had been making "huge" progress in class, and was working hard on his goals. None of the witnesses contradicted Ms. Albert's testimony, nor were the goals shown as inappropriate or ineffectual at school. While Student's witnesses may have had differing opinions of how to most effectively educate Student, none of their information was shared with District for the December 9, 2009 IEP team meeting. Further, while Student's experts advocate a "differentiated education" for Student, as a better methodology with which to teach Student, no evidence was presented to indicate Student was unable to learn in the general education classroom.

27. Student has not met his burden of proof to show that the December 11, 2009 IEP was not calculated to enable Student to receive educational benefit. While not discounting Parent's description of Student's home behaviors, there was no evidence of these behaviors at school, nor were they preventing Student's educational progress. As a result, there was no mandatory reason to modify an IEP, goals, and accommodations as they were working, and no such changes were made at the December 9, 2009 team meeting. Further, goals drive placement. No evidence was presented to suggest the goals and accommodations as contained in the December 11, 2009 IEP could not be implemented in the fifth grade general education placement.¹¹

28. In determining whether a student has been providing a FAPE, a school district must ensure that "To the maximum extent appropriate, children with disabilities. . . are educated with children who are not disabled." (20 U.S.C. § 1412(5)(A); see also 34

¹¹ Ironically, an IEP could not be implemented at Bridges at all.

C.F.R. § 300.114 (2006); Ed. Code, § 56342, subd. (b).) This “least restrictive environment” provision reflects the preference by Congress that an educational agency educate a child with a disability in a regular classroom with his or her typically developing peers. (*Sacramento City School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1403(*Holland*).) The December 9, 2009 IEP satisfied the requirement that a student receiving special education services be placed in the least restrictive environment.

29. When determining whether a placement is the least restrictive environment for a child with a disability, four factors must be evaluated and balanced: (1) the educational benefits of full-time placement in a regular classroom; (2) the non-academic benefits of full-time placement in a regular classroom; (3) the effects the presence of the child with a disability has on the teacher and children in a regular classroom; and (4) the cost of placing the child with a disability full-time in a regular classroom. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1136-1137; (*Holland, supra at 1404*).) These considerations are discussed separately below.

30. As determined in the original decision, it is noted that Student had never been placed in any setting other than a regular classroom. In determining the continuum of placements, there is no dispute, academically, that Student did not require a special day class or a more restrictive environment. The IEP team discussed the appropriateness of resource services to assist Student with his executive functioning and organization, and provided Student with this support.

31. Consideration of least restrictive environment must also weigh the non-academic benefits of Student’s placement in a regular classroom on a general education campus. Student’s education is not impacted by cognitive deficits. Rather, it is impacted by his Asperger’s in non-academic areas such as social skills and interaction, adaptive skills, and behavioral rigidity. All of these unique needs were appropriately addressed by District, in which it proposed a placement in the regular fifth grade classroom at Student’s home school where he would have an opportunity to learn alongside regular education pupils, participate in group activities with typically peers, and be a part of the school community.

32. There is no evidence to suggest Student had a negative impact on the regular classroom or his classmates. The converse, however, was presented by Student, and must be considered. Mother very graphically described Student’s emotional and physical discomfort which she attributed to Student’s placement in a regular classroom at Hermosa Valley. Again, Ms. Albert’s observations did not support a finding that Student was emotionally overwhelmed in her classroom. At the same time that Parents noted significant problems at home, Student was making progress at school in social areas. In class, Student was not as argumentative as he had been in the past.¹²

¹² The cost of placing Student in the regular public school classroom was not at issue, nor is the cost of Student’s preferred placement at Bridges.

33. In conclusion, when weighing the benefit of placement in the least restrictive environment, it is clear that Student's unique needs, goals, and services can be addressed in the regular classroom; and he will receive direct benefit from interaction with his typical peers in the general education environment. District's offer of placement and services as contained in the December 9, 2009 IEP, constituted a FAPE for the remainder of the 2009-2010 school year.

ORDER

Student's claim for relief is denied.

PREVAILING PARTY

The decision in a special education administrative due process proceeding must indicate the extent to which each party prevailed on issues heard and decided. (Ed. Code, § 56507, subd. (d).) Here, the District prevailed on the only remanded issue.

RIGHT TO APPEAL

The parties in this case have the right to appeal this Decision by bringing a civil action in a court of competent jurisdiction. (20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. § 300.516(a)(2006); Ed. Code, § 56505, subd. (k).) An appeal or civil action must be brought within 90 days of the receipt of the Decision. (20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.516(b)(2006); Ed. Code, § 56505, subd. (k).)

DATE: April 14, 2014

/s/

JUDITH PASEWARK
Administrative Law Judge
Office of Administrative Hearings